Filed 3/28/17 In re J.H. CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re J.H., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. J.H., Defendant and Appellant.	A145620 (Contra Costa County Super. Ct. No. J1201630)

Defendant J.H. filed a petition requesting that the juvenile court reduce his adjudication for felony grand theft (Pen. Code, § 487, subd. (c))[1] to a misdemeanor pursuant to section 1170.18, the resentencing provision of Proposition 47. In his petition, J.H. also asked the court to order that a DNA sample he provided at the time of his adjudication be expunged from the state's DNA databank. The court reduced J.H.'s grand theft adjudication to a misdemeanor but declined to order expungement of his DNA from the state databank. On appeal, J.H. challenges the latter ruling, contending section 1170.18 requires expungement. We affirm.

I. BACKGROUND

On November 2, 2012, the Alameda County District Attorney filed a juvenile wardship petition (Welf. & Inst. Code, § 602, subd. (a)) alleging J.H. committed robbery

[1] All undesignated statutory references are to the Penal Code.

(§ 211). The district attorney later moved to amend the petition to replace the robbery allegation with one count of felony grand theft from a person (§ 487, subd. (c)), which J.H. admitted. The Alameda County juvenile court sustained the amended petition and ordered the case transferred to Contra Costa County (where J.H.'s mother resided) for disposition. (See Welf. & Inst. Code, § 750.)

On January 14, 2013, the Contra Costa County juvenile court adjudged J.H. a ward of the court and ordered that he be placed at the Orin Allen Youth Rehabilitation Facility (OAYRF) for six months, followed by a 90-day parole period. Based on his felony adjudication, the court ordered J.H. to provide a DNA sample for inclusion in the state's databank (see §§ 296, subd. (a)(1), 296.1), and J.H. complied.

In August 2013, the court terminated J.H.'s parole successfully and ordered that he remain on probation. In October 2013 and in January 2014, J.H. admitted violations of the terms of his probation.

The Alameda County District Attorney filed a reopened juvenile wardship petition in December 2014, alleging J.H. committed misdemeanor grand theft (§ 487, subd. (c)). J.H. admitted the allegation; the case again was transferred to Contra Costa County; and the Contra Costa County juvenile court again committed J.H. to OAYRF.

In May 2015, J.H. filed a petition to reduce his felony grand theft adjudication (i.e., the first of his two grand theft adjudications) to a misdemeanor pursuant to Proposition 47's resentencing provision, section 1170.18. In his petition, J.H. also requested that the court order the expungement of his DNA sample from the state databank upon reclassification of his felony adjudication to a misdemeanor.

At a hearing on June 4, 2015, the court reduced J.H.'s felony adjudication to a misdemeanor, terminated his probation unsuccessfully, and vacated his wardship. The court denied J.H.'s request for expungement of his DNA sample from the state databank.[2] The court, relying in part on *Coffey v. Superior Court* (2005) 129 Cal.App.4th 809

[2] At the hearing, the parties stipulated that the record of oral argument in another case presenting the same legal issue (*People v. S.B.*, Super. Ct. Contra Costa County, 2015, No. J1301068) be incorporated into the record in this case.

(*Coffey*), which it found "instructive," concluded the reduction of a felony adjudication to a misdemeanor does not require expungement of the offender's DNA sample. J.H. appealed.

II. DISCUSSION

J.H., relying on a recent decision by the Fourth District Court of Appeal, *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209 (*Alejandro*), contends his DNA sample should be expunged because his felony adjudication was converted to a misdemeanor pursuant to section 1170.18. In response, the Attorney General argues that (1) the *Alejandro* court incorrectly concluded section 1170.18 requires expungement, and (2) a subsequent legislative enactment, Assembly Bill No. 1492 (2015–2016 Reg. Sess.) (Bill No. 1492) clarifies that resentencing under section 1170.18 does not provide a basis for expungement.

We review de novo questions of statutory or voter-initiative interpretation. (*People v. Park* (2013) 56 Cal.4th 782, 796 [rules of statutory interpretation apply to voter initiatives]; *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, 1176.) Our task is to determine the intent of the drafters so as to effectuate the purpose of the law. (*Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 213.) To determine legislative intent, we first look to the words of the statute and give them their usual and ordinary meaning. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) But we do not consider the language in isolation; instead, we construe it "in context, keeping in mind the statutes' nature and obvious purposes," and we "harmonize the various parts of the enactments by considering them in the context of the statutory framework as a whole." (*People v. Cole* (2006) 38 Cal.4th 964, 975.) "If the statutory language is unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, then we may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history." (*Ibid.*)

Proposition 47, enacted by the voters in November 2014, reduced certain drug and theft offenses to misdemeanors unless the offenses were committed by otherwise ineligible defendants. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089, 1091.)

Section 1170.18, the resentencing provision added by Proposition 47, provides that a person who was found to have committed a felony, yet "who would have been guilty of a misdemeanor under [Proposition 47]" had it been in effect at the time of the offense, may request that the offense be designated a misdemeanor. (§ 1170.18, subds. (a), (f).) Neither section 1170.18 nor any other provision of Proposition 47 addresses whether the redesignation of a felony as a misdemeanor requires the expungement of DNA samples previously collected as a result of a felony conviction or adjudication. Section 1170.18 only states, in subdivision (k), that an offense designated a misdemeanor pursuant to the statute "shall be considered a misdemeanor for all purposes" except as to restrictions on the person's ability to own or possess a firearm.[3] (§ 1170.18, subd. (k).)

The DNA and Forensic Identification Database and Data Bank Act of 1998 (DNA Database Act), section 295 et seq., requires qualifying persons to submit DNA samples to the state's databank (§ 296, subd. (a)) and specifies procedures for expungement of those samples (§ 299). The DNA Database Act was amended in 2004 through passage of Proposition 69, the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, which "substantially expanded the range of persons who must submit DNA samples to the state's forensic identification data bank." (*Good v. Superior Court* (2008) 158 Cal.App.4th 1494, 1498.) Persons qualifying under the DNA Database Act for submission of DNA samples include: any person, including any juvenile, who is convicted of or who pleads guilty or nolo contendere to a felony offense; any juvenile who is adjudicated under section 602 of the Welfare and Institutions Code for committing a felony offense; and any person, including any juvenile, who is required to register under section 290 (sex offender registration) or section 457.1 (arson offender registration) because of the commission of, or the attempt to commit, a felony or misdemeanor

[3] Section 1170.18, subdivision (k) states a felony conviction that is reclassified as a misdemeanor "shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6."

offense. (§ 296, subd. (a).) The DNA submission requirements "shall apply to all qualifying persons regardless of sentence imposed . . . and regardless of disposition rendered or placement made in the case of a juvenile who is found to have committed any felony offense . . . ." (§ 296, subd. (b).)

Section 299 provides that a person whose DNA profile has been included in the state databank "shall have his or her DNA specimen and sample destroyed and searchable database profile expunged from the databank program . . . if the person has no past or present offense or pending charge which qualifies that person for inclusion within the state's DNA and Forensic Identification Database and Databank Program and there otherwise is no legal basis for retaining the specimen or sample or searchable profile." (§ 299, subd. (a).) Under subdivision (f) of this statute, *"[n]otwithstanding any other law*," a judge is prohibited from relieving a person of his or her administrative duty to submit DNA if the person has been found guilty or was adjudicated a ward of the court for a qualifying offense under section 296, subdivision (a), or pleaded no contest to a qualifying offense. (§ 299, subd. (f), italics added.)

When J.H. filed his petition for relief, subdivision (f) of section 299 set forth a non-exhaustive list of three statutes—sections 17, 1203.4 and 1203.4a—that do not authorize a judge to relieve a person of the duty to provide a DNA sample for a qualifying offense. (§ 299, former subd. (f), added by Prop. 69, § 4, as approved by voters, Gen. Elec. (Nov. 2, 2004).) Bill No. 1492, which was signed into law in October 2015, added section 1170.18 to that list. Accordingly, effective January 1, 2016, section 299, subdivision (f) states: "*Notwithstanding any other law, including Sections 17, 1170.18, 1203.4, and 1203.4a*, a judge is not authorized to relieve a person of the separate administrative duty to provide . . . samples . . . required by this chapter if a person . . . was adjudicated a ward of the court by a trier of fact of a qualifying offense as defined in subdivision (a) of Section 296 . . . ." (§ 299, subd. (f), italics added.) Divisions One and Three of this District have held that section 299, subdivision (f) "was intended to prohibit trial courts, when reducing or dismissing charges pursuant to the listed statutes, from also expunging the DNA record given in connection with the original

felony conviction." (*In re J.C.* (2016) 246 Cal.App.4th 1462, 1473–1474 (*J.C.*); accord, *In re C.B.* (2016) 2 Cal.App.5th 1112, 1123, review granted Nov. 9, 2016, S237801 (*C.B.*).)

Despite the language of section 299, subdivision (f), J.H. contends a court's redesignation of an offense under Proposition 47 *does* trigger a right to expungement of the offender's DNA records because section 1170.18, subdivision (k) states that, upon redesignation, an offense "shall be considered a misdemeanor for all purposes," except with regard to restrictions on ownership or possession of firearms. J.H. argues this provision requires expungement of his DNA samples because a juvenile is not required to submit such samples unless he or she is found to have committed a felony. The decision in *Alejandro* supports J.H.'s position, as the court there held that a felony redesignated a misdemeanor pursuant to Proposition 47 "*no longer qualifies as an offense permitting DNA collection*" and is therefore "outside the matters contemplated by the Penal Code DNA expungement statute." (*Alejandro*, *supra*, 238 Cal.App.4th at p. 1229.) The *Alejandro* court reasoned that, because section 1170.18 specifies only the firearm restriction as an exception to "the otherwise all-encompassing misdemeanor treatment of the offense," courts should not "carve out other exceptions" "absent some reasoned statutory or constitutional basis for doing so." (*Alejandro*, *supra*, 238 Cal.App.4th at p. 1227.)

As we shall explain, we reject J.H.'s argument, and we respectfully disagree with the holding in *Alejandro*. We instead agree with the holdings of our colleagues in Divisions One and Three that redesignation of a felony as a misdemeanor under section 1170.18 does not require expungement of an offender's DNA samples from the state databank. (See *In re C.H.* (2016) 2 Cal.App.5th 1139, 1151, review granted Nov. 16, 2016, S237762 (*C.H.*); *C.B., supra,* 2 Cal.App.5th at p. 1116, rev. granted; *J.C., supra,* 246 Cal.App.4th at pp. 1467–1468.)

First, as noted, neither section 1170.18 nor any other provision of Proposition 47 mentions DNA expungement. We are not authorized to add text to a statute's language. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 350.)

Second, the DNA Database Act does not support a conclusion that reclassification of an offense from a felony to a misdemeanor, without more, necessitates expungement of the offender's DNA records. We note J.H. is incorrect in suggesting that only a felony conviction triggers the obligation to submit DNA samples. The obligation applies to those who admit to the commission of a felony (§ 296, subd. (a)(1)), and applies to some categories of misdemeanants, including those required to register as sex or arson offenders. (§ 296, subd. (a)(3).) Moreover, the DNA Database Act authorizes expungement only for persons with "no past or present qualifying offense" whose cases fall into one of four categories: (1) after arrest, no accusatory pleading was filed, or a qualifying charge was dismissed prior to adjudication; (2) the qualifying conviction or disposition was reversed and the case was dismissed; (3) the individual was found factually innocent; or (4) the individual was found not guilty or acquitted of the qualifying offense. (§ 299, subd. (b)(1)–(4).) J.H., who admitted committing a qualifying offense, does not fit into any of these categories.[4]

We also find persuasive the decision in *Coffey, supra,* 129 Cal.App.4th at page 823, in which the court held that a defendant who pled guilty to a "wobbler" offense as a felony was not entitled to expungement of his DNA sample after the court reduced the charge pursuant to section 17 and sentenced him to a misdemeanor.[5] Although section 17, subdivision (b) provides that an offense reduced to a misdemeanor under that statute is "a misdemeanor for all purposes," the *Coffey* court explained that language means the offense is a misdemeanor "for all purposes *thereafter*, without any retroactive effect." (*Coffey, supra,* 129 Cal.App.4th at pp. 818, 823.) Because Coffey was convicted of a felony when he pled guilty to the wobbler offense as a felony, he was subject to the DNA

[4] We do not hold section 299 provides the exclusive basis for expungement of DNA from the databank, which may be required on constitutional grounds in an appropriate case. (See *C.H., supra,* 2 Cal.App.5th at p. 1148, fn. 5, rev. granted, citing *Coffey, supra,* 129 Cal.App.4th at p. 817.)

[5] A "wobbler" offense is one that can be treated as a felony or a misdemeanor in the discretion of the sentencing court. (*Coffey, supra,* 129 Cal.App.4th at p. 812, fn. 2.)

Database Act when his DNA samples were taken. (*Id.* at p. 823.) The samples thus were lawfully collected, and he had no constitutional right to have them returned. (*Ibid.*)

By analogy, the treatment of an offense redesignated under section 1170.18 as a misdemeanor "for all purposes" (§ 1170.18, subd. (k)) means the offense is treated as a felony up until the time of redesignation, and is only treated as a misdemeanor following the redesignation. (See *C.H.*, *supra*, 2 Cal.App.5th at pp. 1146–1147, rev. granted.) Section 299 authorizes expungement of an offender's DNA sample only "if the person has no past or present offense or pending charge which qualifies that person for inclusion." (§ 299, subd. (a).) "If a felony conviction redesignated as a misdemeanor pursuant to section 1170.18 is treated as a felony up until the time of redesignation, similar to a wobbler felony conviction under section 17, the defendant would continue to have a past qualifying conviction even after the redesignation. Under the terms of section 299, the defendant would not be entitled to expungement of his or her DNA record." (*J.C.*, *supra*, 246 Cal.App.4th at p. 1479; accord, *C.B.*, *supra*, 2 Cal.App.5th at pp. 1123–1124, rev. granted.)

The *Alejandro* court found *Coffey* distinguishable because the DNA expungement statute, section 299, subdivision (f), expressly provided a defendant whose sentence was reduced to a misdemeanor under section 17, subdivision (b) must provide DNA samples, while no statutory provision reflected a similar legislative or voter determination as to an offense redesignated a misdemeanor under Proposition 47. (*Alejandro*, *supra*, 238 Cal.App.4th at pp. 1229–1230.) We note that, even before its recent amendment, section 299, subdivision (f) stated that, "*[n]otwithstanding any other provision of law*," a judge cannot relieve a defendant of the administrative duty to provide DNA for inclusion in the state's DNA databank. (§ 299, former subd. (f), added by Prop. 69, § 4, as approved by voters, Gen. Elec. (Nov. 2, 2004), italics added.) In light of this language, we decline to read the more general language in section 1170.18 that a reclassified offense is to be treated as a misdemeanor "for all purposes" as a grant of authority to disregard the restrictions imposed by section 299, subdivision (f).

In any event, to the extent there was uncertainty about the relationship between Proposition 47 and the DNA Database Act, the Legislature has resolved it with Bill No. 1492, which adds section 1170.18 to section 299, subdivision (f)'s non-exclusive list of statutes that do not authorize a judge to relieve an otherwise qualified person from the administrative duty to submit DNA samples. (See *C.B., supra*, 2 Cal.App.5th at p. 1126, rev. granted.) This amendment clarifies that the redesignation procedure under section 1170.18 does not relieve a defendant of his or her DNA submission obligations.

In his reply brief, J.H. argues section 299, subdivision (f) does not address expungement, since it only states a judge may not "relieve" a defendant of the "duty to provide" DNA samples. We disagree. As noted, section 299, subdivision (f) lists sections 17, 1170.18, 1203.4 and 1203.4a as examples of provisions that do not authorize a judge to relieve a person of the duty to provide DNA samples. Those listed statutes address situations in which a court *reduces* an originally qualifying offense to something less serious: sections 17 and 1170.18 provide for the reduction of a felony to a misdemeanor; sections 1203.4 and 1203.4a provide for dismissal of charges upon successful completion of probation or sentence. The inclusion of those statutes only makes sense if section 299, subdivision (f) is construed to preclude expungement when a court reduces an originally qualifying offense to a nonqualifying offense. (See *J.C., supra*, 246 Cal.App.4th at p. 1475.) Under a reasonable reading of section 299, if a court is not authorized to relieve a defendant of the duty to provide DNA, the court also is not authorized to order expungement of the defendant's DNA. (*C.B., supra*, 2 Cal.App.5th at p. 1127, rev. granted.)

We reject J.H.'s suggestion that the Legislature could only achieve this result by amending subdivision (e) of section 299, which expressly addresses expungement. "It is not our place to dictate to the Legislature the statutory structure" (*J.C., supra*, 246 Cal.App.4th at p. 1475, fn. 8), and, as we have discussed, the intent and meaning of section 299, subdivision (f) are clear from its language.

J.H. also notes the Legislature stated in Bill No. 1492 that the bill was intended to address *People v. Buza* (2014) 231 Cal.App.4th 1446, review granted February 18, 2015,

S223698 (*Buza*), a case concerning the proper scope of section 299 that is pending before our Supreme Court. (Stats. 2015, ch. 487, § 1; see § 299, subd. (g).) But that does not persuade us the bill addressed only that issue. As discussed, the bill's amendment of section 299, subdivision (f), which will remain in effect regardless of the outcome in *Buza* (see Stats. 2015, ch. 487, §§ 4–5), directly addresses the issue raised by J.H. in this appeal.

Finally, J.H. contends that Bill No. 1492 is an invalid amendment to Proposition 47, which states it can only be amended in a manner "consistent with and [in] further[ance of]" its intent. (Ballot Pamp., Gen. Elec. (Nov. 4, 2014), text of Prop. 47, § 15, p. 74; see *People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 568 ["The Legislature may not amend an initiative statute without subsequent voter approval unless the initiative permits such amendment, 'and then only upon whatever conditions the voters attached to the Legislature's amendatory powers.' "].) But not all legislation that addresses the same subject matter as an initiative, or even augments its provisions, is an amendment for this purpose. (*People v. Superior Court* (*Pearson*), *supra,* at p. 571.) Instead, to determine whether a legislative enactment amends an initiative, a court must "ask whether it prohibits what the initiative authorizes, or authorizes what the initiative prohibits." (*Ibid.*)

J.H. argues Bill No. 1492 qualifies as an amendment to Proposition 47 because section 1170.18, subdivision (k) requires treatment of reclassified offenses as misdemeanors "for all purposes," and the addition of section 1170.18 to the list of statutes in section 299, subdivision (f) "prohibits the application of the 'misdemeanors for all purposes' provision in Proposition 47." We disagree.

As discussed, Bill No. 1492 did not amend section 1170.18. Instead, the bill clarified section 299 by adding section 1170.18 to the non-exhaustive list of statutes in subdivision (f) barring courts from excusing qualifying defendants from the administrative duty to submit DNA. Even assuming the prior version of the statute was susceptible to the interpretation that reclassification of an offense under section 1170.18 requires expungement of the offender's DNA, the existence of two equally reasonable

interpretations confirms Bill No. 1492 was a clarification of, not a change to, the statute. (See *C.B.*, *supra*, 2 Cal.App.5th at pp. 1127–1128, rev. granted; *J.C.*, *supra*, 246 Cal.App.4th at pp. 1479–1480, 1482 ["Because . . . Proposition 47 neither requires nor prohibits the expungement of DNA records, Bill No. 1492 does not, as so defined, amend the proposition."].)

III. DISPOSITION

The juvenile court's order denying J.H.'s request for expungement of his DNA samples from the state databank is affirmed.

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Streeter, J.

We concur:

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Reardon, Acting P.J.

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Rivera, J.